VIRGINIA LAW REGISTER

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The Virginia State Bar Association.

The Association met at the Inside Inn, Jamestown Exposition Grounds, on July 30th, 31st, and August 1st. The attendance for the first two days was much smaller than usual and the intense heat made what otherwise would have been an unusually interesting meeting, somewhat languid. The address of President A. C. Braxton was a very able and exceedingly interesting history of the adoption of the 11th amendment to the constitution of the United States, bringing out many forgotten facts connected with the origin and purpose of this amendment and of the adjudications which led up to it. Some rather "foxy" conduct on the part of Wilson and Morris in the preparation and adoption of § 2 of art. III of the constitution was shown by the speaker, who caught and maintained the attention and interest of his auditors from start to finish. The reports of the committees presented nothing of general interest.

On Tuesday evening Hon. Don P. Halsey of Lynchburg read an excellent and well-conceived paper on "The Limits of Centralization." On Wednesday morning Hon. Richard E. Byrd of Winchester read a paper entitled "The Province of the Court in Jury Trials," which in the light of some recent criminal trials aroused much interest, and deserved it. Mr. Byrd has kindly furnished us a copy of this paper, for the present number.

Wednesday evening Hon. Lewis E. Machen of Alexandria read an article on "The Duty of the State to Diminish Divorce." A paper filled with timely and able thoughts upon this growing evil. As will be seen from their titles each paper was upon a live topic, and should have called forth discussion. But the Virginia lawyers in State Bar Association assembled are the most silent and undisputatious set of men in the world. Always ready and willing to "spat" upon all subjects legal, ethical or

moral when informally together, the moment they assemble in "due form," they become one of the most grave, sombre and taciturn sets of men in the world. The President solemnly announces as each speaker takes his seat "Discussion on the subject of the paper read is now in order." But "the rest is silence."

The annual address of Hon. John R. Don Passos of the New York Bar was a disappointment in some ways, though delivered extemporaneously and with much vigor and eloquence. The extreme heat told alike upon speaker and audience, the former shortening his address somewhat. He advanced some rather startling theories—such as the absolute prohibition of immigration for a lengthy period, and suggested the impossibility of the states regulating the corporations, urging the necessity of the strengthening of federal powers in this behalf and vigorous use of those powers when needed. The address, when published, we are confident will command attention and thought.

A resolution was offered that a committee be appointed to report to the next meeting of the Association the advisability of memoralizing the General Assembly to adopt the English Practice Act with such modifications as our system of jurisprudence might necessitate. It was adopted with but one dissenting vote.

The banquet was largely attended and notable for the fact that there were but four after-dinner speeches, Judge Waddill speaking for the Federal Judiciary in a forceful and able manner; Judge Duke for the State Judiciary; Judge Moore delivering one of his usual brilliant and witty addresses on matters and things in general—charming alike in matter and manner—and Hon. Joseph Wysor winding up in an address on "Brainstorm," in which Shakespearean quotations delivered in brilliant style were interspersed between original eloquence and glowing wit and humor that made the audience regret when he ceased and cry for more.

At no time in the history of our nation have the silent influences which mould important changes in the body politic

been more at work than to-day. The sudden and, in some ways, startling attitude of the chief executive of the Union toward public service corporations; the vigorous prosecution of the Standard Oil Company under the Sherman Act; the commencement of seemingly equally vigorous prosecutions against the American Tobacco Company and International Harvester Company of America indicate that the Federal Government at last intends to see its laws obeyed, no matter how strong or wealthy the transgressors. And now the states are taking a hand in the regulation of corporation affairs, and the work of the newly-appointed corporation commissions in several of the Southern States has brought up sharply before the public mind the interference of the Federal Judiciary with the powers of the States. What the result may be upon these courts in consequence of their assumption of jurisdiction and in several instances their hasty—if not to say somewhat arrogant—use of the writ of injunction, no man can foresee. That there is much impatience, and more dissatisfaction with the assumption of power by these tribunals, than ever before in our history since the case of Chisholm *v.* Georgia there can be no doubt, and that it will continue to grow seems equally true, until the pressure will be felt by the Congress, and their jurisdiction so limited that they shall not be, as George Mason predicted they would be, "the destroyers of the rights of the States," and as Jefferson styled them "the sappers and miners of the Constitution."

Railroads and the States.

No matter what the profession may think of Judge Pritchard's right to interfere in North Carolina with the act fixing the rate of two and one-quarter cents per mile—and there is room for argument on both sides of the question—the attitude of the roads themselves in surrendering the temporary advantage gained by the injunctions, shows the lack of wisdom in the original course pursued, which has given rise to almost universal disapprobation and aroused deep and dangerous antagonism against them.

The clash of jurisdiction between the State and Federal courts with results as unnecessary as unseemly, is bad enough, but the undercurrent of public opinion already setting towards dan-

gerous socialistic ideas has been given an impetus and direction, which is in many ways worse. In Virginia the action of Judge Pritchard, as far as we can gather from hurriedly expressed opinions of many lawyers, seems almost indefensible. If the State Corporation Commission is a court, he was and is absolutely without jurisdiction and he ought to have known it and certainly ought not to have assumed a jurisdiction as to which there is grave doubt. Then to have enjoined a preliminary act, simply one step in the process of carrying out its ruling—the publication in a newspaper required by the Act of Assembly prior to fixing the rate—indicates a haste to act, unseemly in a high tribunal and not evincing that judicial temperament and calm deliberation which should characterize an impartial judge. Judge Pritchard might well take a lesson in deliberation from the action of our own State authorities of whose conduct we have every reason to be proud. Their course has been marked in an eminent degree by common sense—calm consideration and dignified procedure, accomplishing the desired end without theatrical exhibitions or hysterical threats. That the main issues should be promptly decided with as little friction or acrimony as possible was apparent. But that the power of the State to regulate one of its own creations should be compelled to await the pleasure of a North Carolina judge—a stranger to our law—and he be allowed to "put Virginia in a state of syncope" to use Senator Daniel's expression, was a thing so monstrous as to cause the blood to flow a little quickly. But the railroad with commendable promptness met the State authorities and these two questions will soon be settled, we hope in the right way, i. e.: 1. Is a passenger rate of two cents a mile reasonable? 2. Have the Federal courts the power to enjoin our Corporation Commission, clothed with judicial and legislative functions by the Constitution of the State? The first is a question of mere fact and its determination is, comparatively speaking, of small moment. The second is momentous. Its decision will be awaited by all true lovers of constitutional liberty and government with anxiety, not to say apprehension.

In the meantime it behooves the lawyers who should always be leaders in conservative and high thought, to counsel and

practice dispassionate and calm consideration of the whole matter, and respectful submission to the ultimate decision of the Supreme Court.

Federal Judges.

The nature of the Federal Judiciary and the character of the Federal Judge is undergoing more scrutiny just now, in a quiet way, than has been the case for many years. If the public press be a fair exponent of public opinion, there is a steadily growing distrust of Federal judges. One grave objection urged against them is their eagerness to assert jurisdiction and their readiness to interfere in state matters in cases of very doubtful jurisdiction. It seems to us that so delicate is the question of the interference with the powers of the states and one so fraught with danger of disagreeable and unseemly clashes, that in every case of doubt the Federal Judge should solve it against himself. The contrary seems the case. Love of power or desire to be brought into notice seems to overshadow what should be judicial prudence and care. The objection is urged—not without force—that the District and Circuit Bench is too often made a sort of "consolation stakes" for prominent defeated politicians, or politicians who foreshadow defeat, and that Federal Judges are not selected with a due sense of their legal ability, their professional standing and personal character, but rather for their political prominence. A good senator, or fine congressman, is not always the best judicial timber. We are to be congratulated on the gentlemen who so ably fill our own District benches. One is entitled to and has all the traditions of the Commonwealth engrafted thoroughly in him. We can count on his prudence and careful consideration. The other, we have had occasion to experience, scans the question of his own jurisdiction with an eye single to the importance of the question, and in case of doubts leans against himself, as he should do. Both are trained lawyers, of experience and ability and men whose character needs no word of praise. Oh! *Si Sic Omnia.*

So great has the divorce evil become now that we read protests on all sides, and not a few suggestions as to the proper

remedy to be applied, for it is indeed a disease, and a disease that threatens the vitals of organized society.

Causes for the Spread of the Divorce Evil.

What is the real cause? Is it that divorces are made too easy? It has seemed so to some, and the National Divorce Congress that met in Philadelphia attempted to make the divorce laws more drastic. Others think that the trouble lies in the fact that marriage is made too easy, and that it should be hedged about with rigid restrictions and limitations, though this latter view could hardly be taken by any one in Virginia, as our laws are already as strict in this respect as a sound public policy permits. As holding the view that hasty, ill-considered marriages are at the bottom of the trouble, we will quote at some length from an article by Judge Stevens, of the Ninth Judicial Circuit of Wisconsin, in the June number of the Outlook. He says:

"The chief cause for the flood of divorce is the great number of hasty, ill-considered, wholly bad marriages performed each year. Any genuine reform of our divorce system must commence at the beginning rather than at the end of the marriage. The improper marriages each year greatly exceed in number the improper divorces. Outside certain limitations as to age, blood relationship, and mental capacity, people may marry from mere impulse or caprice, fleeting fancy, pique, or jealousy, without the slightest recognition of the earnestness or the seriousness of the step that is taken. Any country fair or street carnival can find some couple ready to be married in a balloon for notoriety's sake.

"Every now and then the papers tell the story of a village dance where three couples out of four in a quadrille were married before the music began, or of some village justice who arose late at night, and, without change of clothing, through an open window, married some wandering twain by the light of a match dimly burning. The other day, as I left the court-house, four couples of young people passed the building. One girl said, 'Let's go in and get married.' Had some dare-devil responded, 'All right,' we might have had four more couples on the way to the divorce court. Recently the papers recorded the fact that a tramp, walking on a wager across the continent, had less difficulty in finding a maiden and a minister to make

him a benedict on the way than he had in covering the required number of miles per day.

"A Western paper of recognized standing (Portland Oregonian) recently said, with more zeal than justice, perhaps, that 'a large share of this mischief is done by lazy and greedy preachers who ought to be sawing wood for fifty cents a cord, instead of marrying babies for a few dollars apiece.' Be this as it may, any man and woman, however unfit to assume this relationship, can always find some magistrate or minister to unite them for life or for the divorce court. We can never have a proper regulation of marriage while the State permits the magistrate or minister who is to receive the fee to determine whether the marriage shall be performed.

"Most states still recognize the common law marriage. Without the presence of magistrate or minister, with no witness present and no record made, the common law marriage may be consummated in some dark and cozy corner long after the lawyer has laid aside his briefs and his books; yet we do not think of transferring an acre of land or of taking security for a loan without the assistance of a lawyer.

"When we in Wisconsin propose legislation that shall in some way regulate marriage, the bill is laughed out of the Legislature, and classed with legislation taxing old bachelors to provide for the support of old maids. In fact, there are more laws to tax bachelors than properly to regulate marriage. Texas some years ago imposed a penalty of fifty dollars a year on every unmarried man over thirty who did not exercise due diligence in an endeavor to marry. Due diligence under this law was shown by producing an affidavit of some respectable woman that he had offered himself in marriage during the year. Missouri adopted a 'Single Tax Law' in 1897, which provided that any maiden or widow who rejected an offer of marriage should be sentenced to six months darning the socks and sewing on the buttons of the rejected suitor.

"Society has established tribunals to pass on the right of the husband and wife to leave the married state; why should it not regulate their right to enter upon the same estate? Yet we must recognize that the most that legislation can do is to regulate marriage that it shall be surrounded by the most favorable legal

environments. Legislation too far in advance of the thought of the people produces evil results. Bavaria prohibited the marriage of all persons who were not able to support themselves. As a result, one-fourth of the whole number of children were born out of wedlock. Immediately upon the repeal of the law the marriages increased fifty per cent., and there was a corresponding decrease in the number of illegitimate children. In Mexico, after the church lands were confiscated, the priests, in order to maintain their revenues, raised the marriage fee. The fee did not bring an increased revenue, but there was no decrease in the birth-rate or in the number of new homes established.

"Our apathy and lack of care as to preparation for the responsibilities of married life are well-nigh incredible. We carefully instruct our children as to their behavior in the ballroom and at the dinner table, in the office and at the shop; yet, through some sort of false modesty, we often leave them to work out their own salvation in this, the most important relationship of their lives—leave them to learn by sad experience, when too late, that which we should have taught them long before they yielded to some sudden impulse in selecting a mate for life.

"If all parents could sit in the divorce court and listen to the tales of suffering undergone through these unfortunate marriages, they would awake to a realizing sense of their duty; our homes, our schools, our churches would prepare young men and women for these responsibilities. Better marriages, happier homes, fewer divorces, would be the result. So long as we leave recklessly wide the door that leads to wedlock, there must of necessity be a broad way out. In the words of Milton, we must have tender pity for 'those who have unwarily, in a thing they never practiced before, made themselves the bondmen of a luckless and helpless matrimony.'

"The physician usually learns of the ruined home and the broken health of its inmates before the lawyer. Four hundred leading physicians throughout the United States agree almost without exception that the causes of divorce are improper marriages, or improper conditions after marriage; that the statutory grounds alleged are simply the methods whereby the parties comply with the law regulating their separation, not the

real ground for the divorce. Ninety-seven per cent. of these physicians said that education in sexual matters would overcome the evils arising from these improper marriages.

"Society protects itself from epidemics of smallpox and cholera; it should adopt some safeguard against marriages that shall burden it with generation after generation of physical weaklings, moral degenerates, and criminals. Experts tell us that one-half of the insane now confined in asylums have hereditary tendencies to insanity. Phrenologists have traced the history of such families as the Jukes, which have, through successive generations, preyed on society. We cannot tolerate the Spartan law of exposing weakly children, but we ought to protect ourselves by preventing improper marriages and by putting an end to such improper marriages as become a menace to society.

"The success of the Jews as a race is largely due to their regulation of marriage. Some of the higher class in Brazil, by self-imposed rule, require the proposed spouse to present the certificate of a physician that he is not afflicted with certain diseases. Recently a women's congress at Paris voted to require such certificates as a protection to their daughters.

"In America we need more of the English idea that marriage is a life settlement, in which parents and guardians should play a larger part. If this idea prevailed, we should have fewer homes in which such scenes are enacted as those that have been rehearsed under oath upon the witness stand.

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"One who listens to divorce cases day after day almost concludes with Stevenson that 'marriage is a field of battle and not a bed of roses.' He will at least conclude that there is no purgatory in matrimony, it is either paradise or the inferno.

"Divorce is a remedy, not a disease. Some sixteenth-century writer said that it was a medicine for the disease of marriage. It is at best pure surgery to which resort should be had in the extremity, but which should never be tolerated when milder remedies will suffice. But we may as well expect to cure tumors by ignoring them as to right blighted marriages and ruined homes by abolishing divorce.

"We hear it said that divorce is immoral. Nothing can be more immoral than to doom sensitive women to a life worse than slavery, in constant fear of physical injury, if not death,

at the hands of some brutal, drunken husband; than to condemn innocent little children to the dominion of mothers not worthy of the name, of fathers brutal in the extreme; than to compel men to live with drunken, profligate wives.

"Churches differ in their interpretation of the Gospels. Most churches so interpret divine law as to permit divorce in case of unfaithfulness. It is not easy to see how, in its effect on the divine ends to be worked out through family life, a transient lapse from the cardinal virtue is any better cause for dissolving the marriage bond than is an attempt to kill the other spouse; than is the steady grinding out of the fountains of life by repressive contempt, by threats, by ever-present fear, by oft-repeated blows; than is the desertion of a wife and little ones in the dead of winter, without clothing, fuel or food; than is the habitual drunkenness of either party, whose home-coming is looked forward to with fear, whose presence in the home converts it into a hell.

"Some writers arrive at the conclusion that modern divorce statutes are not in conflict with the strict letter of the Scriptures by asserting that God does not join together those who are led to the union by lust of the flesh, lust of the eye, or pride of life; that therefore they do not come within the command, 'What therefore God hath joined together, let not man put asunder.' These writers say that it is an insult and an affront to the wisdom and goodness of the Supreme Being to charge Him with joining together those who throng our divorce courts.

"Luther reasoned that the magistrate decreeing the separation was the representative of the Supreme Being, therefore it is not man who puts asunder that which God has joined together. Three centuries ago Milton reached the conclusion that the Creator's responsibility ceased when he ordained marriage, for every day experience proves that he could not have determined what particular men and women should be united in wedlock. Certain it is, if the marriages that end in our divorce courts are made in heaven, the contracting parties soon become earthly examples of the fallen angels.

"By some process of reasoning, the great mass of men conclude that there are cases in which legal separation must be decreed as long as existing conditions as to marriage prevail."

A Question of Ethics.

Along with the question of the interference of the Federal Judiciary with the rights of the States, there has been some discussion of the duty of the lawyer in the selection of a tribunal for litigation. No one can question the right of the attorney to do all that in his judgment he deems wise and befitting—subject, of course, to the rules of high honor and professional ethics—for the interest of his client. This includes the right and duty to select that tribunal in which he thinks his client's cause will be best heard and most fairly decided, and only the most captious critic can complain of the attorney in making such a selection. And yet is it not sometimes the part of wisdom to weigh well not only the immediate gain, but the ultimate result of a choice.

Cases are no longer entirely tried in the courts. We have trial by newspaper; trial at the bar of public opinion; trial on the street corners. Cases are gained in court, but the gain far offset by the loss in the estimation of the public, and in the antagonism raised against the litigant, even though successful. This very success often accentuates the bitterness of the public mind.

No question is oftener asked now on the street and in the offices where the present Railroad Litigation is discussed—and it is much and widely discussed—than the one: "Why do the railroads always go into the Federal Courts? Are they afraid of the judges in the State Courts? Do they believe them inferior in honesty, in legal knowledge, in fairness, to the Federal Judges? Are our judges inferior in these respects to the Federal Judges? If they are, ought they not to be turned out, and new ones put in, or ought we to change our methods of selecting them and get better ones." Laymen will not listen—or do not seem to understand—that the forum in these cases is as often the selection of the client as of the attorney. Nor does the argument as to the speedier determination of the questions involved, by the supreme court of the United States, by bringing the original action in the Federal court, appeal to lay minds. They seem to think that an unfair advantage is sought or some sort of trickery involved, and a bitterness of feeling is engendered and expressed. Lawyers also, many of them, of no mean ability and of fair judicial tem-

perament, depricate the ever-growing tendency of an appeal to Federal Courts, when the same questions could be as easily and with much less expense and loss of time decided in the State Courts. There is a feeling both in the lay and in many legal minds that the Federal Court is a foreign one, hostile to the State and to its citizens. Unjust it may be and undoubtedly is, but it is a feeling which is growing. Does it not therefore become incumbent upon the legal profession to do all in their power to allay this feeling, and to think well upon the consequences ere they encourage litigation in Federal Tribunals? Especially where the remedy sought is one equally available in the State Court.

The fact is—should not the lawyer, ethically speaking, ever have in his mind along with his duty to his client, that higher duty towards the public weal which should look to the final result of any contemplated action in which large public interests are concerned? If the consequence of his act is to arouse a dangerous public sentiment or antagonism which may prove in the end fatal to the cause of good government and right living, and he can avoid this by judicious action without jeoparding the real right of his client's cause, ought he not to do it? Can he not do it?

Darrow's Speech.

For instance, what lawyer thoughtful of the dignity of his calling, the responsibility resting upon him, his duty as a man or a citizen, would have dared to make the socialistic and demagogic harangue Clarence S. Darrow made in the Haywood trial. It was a blur and a blot upon a case towards which the whole public attention was called. A case conducted with eminent dignity, judicial impartiality, and wonderful skill. The verdict—whose righteousness is unquestioned as far as the integrity of the Bench and Jury is concerned, but whether just, if all the facts could be known is questionable—has been accepted with calm acquiescence by the body of the people.

But Darrow's speech must remain as one unworthy of a high lawyer—unnecessary, unjustified by anything in the case, tending to evil and deeply to be condemned.

Errata.

The typewriter, the compositor or the devil (printer's, of course) made us say exactly the opposite of what we meant, in our editorial on "Contempt of Court," upon p. 324 of our August number. We shortened the quotation from the opinion in that case, thus giving the wrong meaning to our phrase. What we meant was "That in view of these utterances, etc., etc.," it was hard to see how the Court in Yoder's Case could have held that the "omission, etc., etc.," is *not* "so unreasonable, etc., etc."

NOTES OF CASES.

Constitutional Law—Weight of Standards of Lumber Cars.—An attempt by the legislature arbitrarily to fix the weight of the standards of lumber cars, and to compel the carrier to deduct the weight so fixed from the net weight of the lumber placed on the car, and charge freight on the balance only, is held, in State ex rel. Washington Mill Co. *v.* Great Northern R. Co. (Wash.) 6 L.R.A.(N.S.) 908, to be void as an unconstitutional interference with the carrier's property rights.

Contracts—Offer and Acceptance—What Constitutes.—The acceptance by telegram of an offer by mail, which does not specify any mode of acceptance, is held, in Lucas *v.* Western U. Teleg. Co. (Iowa) 6 L.R.A.(N.S.) 1016, not to complete the contract until the telegram is delivered to the sendee.

Corporations—Deceit by Corporators—Liability to Creditors.—Deceit by corporators in falsely making a statement required by statute, that their articles of association shall set out the amount of their capital stock, and that it is actually paid in, is held, in Webb *v.* Rockefeller (Mo.) 6 L.R.A.(N.S.) 872, not to render them liable to creditors, on the ground that such statement is required as a condition to the right to do business, and not for the purpose of procuring credit.

Removal of Furniture by Unusual Method.—The New York Supreme Court, in Marder *v.* Heinemann, 100 New York Supplement, 250, upholds the right of a tenant who has, with the landlord's sanction, moved an ice box into a leased store, by removing the large plate glass which formed part of the front store, to remove the ice box in the same manner on the termination of the lease, even though the landlord does not give his consent to such removal.